

RCW 41.56.030(2)(c) and interpreting precedent. An election is directed to resolve the question concerning representation.

BACKGROUND

The City of Bellevue is among the largest cities in Washington. The workforce of the Bellevue Police Department includes a total of about 265 employees, of which about 166 are law enforcement officers who are "uniformed personnel" under RCW 41.56.030(7). The chain-of-command structure of the Bellevue Police Department includes the chief of police, two deputy chiefs who report to the chief, four majors who report to the deputy chiefs, and seven captains who report to the majors.

The employer has existing bargaining relationships with organizations representing two bargaining units in the Bellevue Police Department. The office-clerical and other support personnel are represented by Teamsters Local 763. The non-supervisory uniformed personnel (police officers and lieutenants) are represented by the Bellevue Police Officers Guild. In the past, the employer has assigned either two majors, or one major and one captain, to its negotiating teams for collective bargaining with those unions.

POSITIONS OF THE PARTIES

The union acknowledges that the disputed majors sit in on collective bargaining negotiations on behalf of the employer, but it contends that they have no part in the development of economic proposals, that they play no role in deciding the employer's bottom line in contract negotiations, that they have no authority in

regard to accepting or rejecting a union proposal, that they play no role in the ratification of tentative agreements by the city council, and that they have only a very limited role in administering collective bargaining agreements. It thus urges that the employer has not satisfied the heavy burden to exclude any of the majors as confidential employees.

The employer contends it is entitled to have two majors excluded as "confidential employees", based on a long history of using these positions in the formulation of labor relations policy and preparation for and conduct of collective bargaining. The employer further contends it is reasonable for the employer to have two majors designated as confidential employees in order to perform the functions of the employer in the collective bargaining process.

DISCUSSION

The Separate Unit of Supervisors

The union petitioned for a separate bargaining unit of supervisors, claiming 11 positions. Decisions validating the propriety of such a bargaining unit go back to City of Tacoma, Decision 95-A (PECB, 1977) and City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). Except for the policy of limiting their unit placement to bargaining units separate from those they supervise (in order to avoid a potential for conflicts of interest which would otherwise exist), supervisors are employees with all rights conferred by Chapter 41.56 RCW. Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977). Separate units of law enforcement supervisors presently exist in several of the larger cities and counties in the state.

The "Confidential" Exclusion

The employer originally claimed that 4 of the 11 positions sought by the union (36% of the petitioned-for unit) were "confidential employees" under RCW 41.56.030(2), which provides in part:

"Public employee" means any employee of a public employer except any person ... (c) whose duties as a deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the public employer ...

In ruling on claims of "confidential employee" status, the Commission applies the labor nexus test established by the Supreme Court of the State of Washington in International Association of Fire Fighters v. City of Yakima, 91 Wn.2d 101 (1078), as follows:

Those in whom ... trust is continuously reposed could and perhaps would participate in the formulation of labor relations policy. They would be especially subject to a conflict of interest were they to negotiate with an employer on their own behalf. By excluding from the provisions of a collective bargaining act, persons who work closely with the executive head of the bargaining unit, and who have, by virtue of a continuous trust relationship, assisted in carrying out official duties, including formulation of labor relations policy, such conflict is avoided. And, public trust is protected since officials have full loyalty and control of intimate associates. When the phrase confidential relationship is used in the collective bargaining act, we believe it is clear that the legislature was concerned with an employee's potential misuse of confidential employer labor relations policy and a conflict of interest.

This concern is clearly expressed in the Educational Employment Relations Act, RCW 41.59. Although not controlling here, it

contains an instructive definition of the confidential employee. It reads:

(i) Any person who participates directly on behalf of an employer in the formulation of labor relations policy, the preparation for or conduct of collective bargaining, or the administration of collective bargaining agreements, except that the role of such person is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment; and

(ii) Any person who assists and acts in a confidential capacity to such person.

RCW 41.59.020(4)(c)(i) and (ii).

Were we to significantly alter this definition in interpreting RCW 41.56.030(2), an anomalous result would occur. ...

...

We hold that in order for an employee to come within the exception of RCW 41.56.030(2), the duties which imply the confidential relationship must flow from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official. The nature of this close association must concern the official and policy responsibilities of the public officer or executive head of the bargaining unit, including formulation of labor relations policy.

City of Yakima, supra, at 105-107.

The party claiming "confidential" status has a heavy burden of proof. City of Seattle, Decision 689-A (PECB, 1979). At the same time, the "labor nexus" test does not nullify the statutory exclusion of confidential employees. Employers are allowed some reasonable number of personnel who are exempt from the rights of the collective bargaining statute, in order to perform the functions of the employer in the collective bargaining process. Lewis County, Decision 5259 (PECB, 1995).

Application of PrecedentThe Employer's Change of Position -

The employer's original position in this case was that all of the majors should be excluded from the petitioned-for bargaining unit as confidential employees.¹ City of Yakima, supra, arose out of a similar attempt to apply the "confidential employee" label to an entire class of battalion chiefs who were unquestionably supervisors. Immediately following the above-quoted holding in Yakima, the Supreme Court added: "General supervisory responsibility is insufficient to place an employee within the exclusion." Had the employer persisted with its original demand for a wholesale exclusion of the majors in this case, its arguments could easily have been rejected on the same basis as the similar arguments advanced in Yakima.

The refocus of the employer's arguments on two positions that are claimed to have actually done labor nexus work, or necessarily will do labor nexus work in the future, presents a closer question. The Commission's precedents include splitting of the "major" rank in a police department, where the facts supported exclusion of some, but not all, positions at that rank. City of Seattle, Decision 689-C (PECB, 1981).

Exclusion by Formula -

A statement of issues in the employer's brief, at p. 5, and argument in that brief, beginning at p. 9, can be interpreted as advancing a formula whereby the existence of two bargaining units within the Bellevue Police Department is a basis for a similar

¹ That position affecting more than 36% of the employees claimed by the union forced this case to a hearing in advance of a determination of the question concerning representation.

number of "confidential" exclusions. It is thus appropriate to point out that the Commission has recently, and specifically, rejected the use of any sort of numeric formula in making decisions on exclusion of confidential employees from bargaining units. See, Walla Walla School District, Decision 5860-A (PECB, 1997), affirmed WPERR CD-1275 (Thurston County Superior Court, 1998). A confidential exclusion must be on the basis of an actual labor nexus.

Involvement in "Economic Package" Decision -

The Executive Director is not persuaded by the union's contention that "confidential employee" status should be denied because the disputed majors are not directly involved in deciding the employer's economic proposals. The authority to appropriate funds and ultimate decisions on budget priorities properly lie with the city council members elected to office by the voters in the jurisdiction, and excluded separately from bargaining rights by RCW 41.56.030(2)(a). In the public sector, it is typical for employer negotiators to perform their functions within a range of authority conferred by elected officials, and to enter into tentative agreements which are subject to ratification by the elected officials at an open, public meeting. See, State ex rel. Bain v. Clallam County, 77 Wn.2d 542 (1970).

Privy to Confidential Information -

The employer's arguments in this case cannot be characterized as speculative or anticipatory. The evidence establishes that the assignment of employees from the major or captain ranks to the employer's bargaining teams predates the filing of the petition in this proceeding.

The evidence also indicates that the majors assigned to sit at the bargaining table for the employer have actually been provided with information as to how much money is available, and what the package

can contain. There is flexibility within the bargaining process as to how the money allocated to a particular department will be spent. The disputed majors are given the freedom to look at the range of authority conferred by the elected officials, and to assess how it can be packaged in a manner that might be acceptable to both parties. They can also question the amount allocated, or make recommendations to increase the funds available. From both current and historical perspectives, the disputed majors play an active role in the implementation of labor relations policy for the police department, not only in discussing issues with union negotiators at the bargaining table but also in discussing issues with the city manager and the employer's labor relations consultant. They provide operational advice, and have participated in management team discussions of strategy, proposals and packaging alternatives. In some instances, proposals have been substantially modified.

The Executive Director is not persuaded by the union's claim that the disputed majors are merely observers in the collective bargaining process. While confidential exclusions have been rejected, both historically (e.g., Yakima County, Decision 4625 (PECB, 1994)) and recently (e.g., Yakima County, Decision (PECB, 1999)), as to individuals who seemingly sat at the bargaining table as "bookends" without meaningful access to confidential information, the evidence does not support the union's argument as to the two majors proposed for exclusion in this case. Rather, the majors at issue in this case are in a position to know the employer's strategies and know what proposals/responses are being contemplated before they are communicated to the union. They are called upon to maintain information of a confidential nature, and thus serve in a position of trust and responsibility with respect to labor relations. See, Olympia School District, Decision 4736, 4736-A (PECB, 1994).

The employer has also satisfied the burden to show necessity of the exclusions it proposes. Although bargaining is only a small portion of the overall command activities of the disputed majors, the employer has outlined other responsibilities which occupy the time of its chief of police and the two deputy chiefs. The labor relations functions have been delegated historically to employees in the major and captain ranks. The employer's need for confidential exclusions is stable or increasing. The two existing bargaining units are represented by different unions, and the petitioned-for unit would be represented by yet a third union. There is no evidence of a labor council, or even of any joint efforts by the three independent unions. There is no reason to doubt the continued applicability of those considerations. Further, it is not the responsibility or right of the Commission to prescribe the employer's table of organization or determine who will represent the employer in collective bargaining. Rather, it is the responsibility of the Commission to determine disputes as to whether the persons designated by the employer have, in fact, the labor nexus required for exclusion as a confidential employee.

Even if a deputy chief could be substituted to act on behalf of the employer in collective bargaining for the petitioned-for bargaining unit,² that would not yield the result proposed by the union. Individuals who are "confidential employees" under RCW 41.56.030(2)(c) are excluded from all rights under Chapter 41.56 RCW, so there is no possibility of an individual who has access to confidential labor relations information concerning one of several bargaining units being a member of one of the other bargaining units.

² The union argues that one of the deputy chiefs is an experienced and knowledgeable negotiator, and that the demands on his time for negotiations with the petitioned-for bargaining unit would be limited.

FINDINGS OF FACT

1. The City of Bellevue is a municipal corporation of the state of Washington, and is a public employer within the meaning of RCW 41.56.030(1). Among other services, the employer maintains and operates the Bellevue Police Department.
2. International Union of Police Associations, AFL-CIO, a bargaining representative within the meaning of RCW 41.56.030(3), filed a petition with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative for all command staff (majors and captains) employed by the City of Bellevue in the Bellevue Police Department, excluding the police chief, deputy chiefs and all patrol officers.
3. Employees holding the rank of captain and/or major in the Bellevue Police Department are supervisors within the meaning of Commission precedent.
4. During initial processing of the representation petition described in paragraph 2 of these Findings of Fact, the employer sought exclusion of all of the majors from the bargaining unit, claiming that they were all confidential employees. At the hearing held in this matter, the employer altered its position to only request exclusion of two majors as confidential employees.
5. The employer has existing collective bargaining relationships with an organization representing a bargaining unit of non-supervisory law enforcement officers in the Bellevue Police Department, and with an organization representing a bargaining unit of office-clerical and other support personnel in the

Bellevue Police Department. There is no claim or evidence that the Bellevue Police Officers Guild, as exclusive bargaining representative of the non-supervisory law enforcement officers, or Teamsters Union, Local 763, as exclusive bargaining representative of the support personnel, negotiate together or otherwise coordinate their bargaining activities.

6. Employees holding the rank of captain and/or major have historically been assigned to serve as members of the employer's bargaining team in collective bargaining negotiations with the organizations representing the bargaining units described in paragraph 4 of these Findings of Fact. With the formation of the bargaining unit petitioned-for in this proceeding, the employer anticipates assigning such responsibilities only to two individuals holding the rank of major.
7. The majors assigned collective bargaining responsibilities on behalf of the employer have or will have participation in management meetings where bargaining proposals and strategy are discussed, and participation in collective bargaining negotiations. As such, they have been and will be privy to confidential information concerning the labor relations policies of the employer.

CONCLUSIONS OF LAW

1. Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.
2. A bargaining unit consisting of all supervisory uniformed personnel employed by the City of Bellevue in the Bellevue Police Department, excluding elected officials, officials appointed for a fixed term of office, the chief of police,

deputy chiefs, confidential employees, non-supervisory employees and non-uniformed employees, is an appropriate unit for the purposes of collective bargaining, and a question concerning representation currently exists in that bargaining unit.


3. The individuals holding the rank of major who are assigned to participate in collective bargaining, on behalf of the employer, are confidential employees within the meaning of RCW 41.56.030(2)(c), and are not public employees eligible to vote in the representation election directed in this proceeding.

DIRECTION OF ELECTION

A representation election shall be conducted by secret ballot, under the direction of the Public Employment Relations Commission, in the appropriate bargaining unit described in paragraph 2 of the foregoing conclusions of law, for the purpose of determining whether a majority of the employees in that unit desire to be represented for the purposes of collective bargaining by International Union of Police Associations, AFL-CIO, or by no representative.

Issued at Olympia, Washington, the 4th day of June, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARVIN L. SCHURKE, Executive Director

This order may be appealed to the Commission by filing objections under WAC 391-25-590.